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THE HONORABLE FRED VAN SICKLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR, Plaintiff, v. IMPULSE MARKETING GROUP, INC., Defendant IMPULSE MARKETING GROUP, INC., Third Party Plaintiff v. BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED Third Party Defendants	NO. CV-04-5125-FVS MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO RESCHEDULE OR STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Jury Trial Demanded

COMES NOW the Plaintiff, James S. Gordon, Jr., and hereby objects to

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Defendant's motion to reschedule or strike Plaintiff's motion for summary judgment.

Beginning with the Plaintiff's original filing of its motion to dismiss and continuing through all of the subsequent skirmishes between the Parties related to this motion, the Plaintiff has asserted that the Defendant had no good faith basis to bring its claims against the Third Party Defendants, and had done so purely to punish the Plaintiff by suing his family and friends. In this latest filing, the Defendant has essentially conceded the point. The Defendant now admits that it cannot articulate facts that would support its claims, and thus wants the Court to strike the Plaintiff's motion for Summary Judgment. The Plaintiff therefore agrees with the Defendant that the Court should strike the Plaintiff's pending motion. However, the Court should do so not to allow the Defendant to go on an evidentiary fishing expedition. Rather, the Court should do so because the Court has first dismissed the Defendant's counterclaims and Third Party claims, thereby rendering the pending motion for summary judgment moot.

The Court must bear in mind that the Plaintiff's motion before the Court does not seek judgment on the *Plaintiff's* claims. Rather, the Plaintiff's motion before the Court seeks to dismiss the *Defendant's* counterclaims and Third Party claims.

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The Defendant had an obligation under FRCP 11(b)(3) not to bring those claims unless "the allegations and other factual contentions had evidentiary support." The Defendant now admits that it cannot articulate any such evidentiary support. Accordingly, the Defendant has admitted that its claims cannot survive the Plaintiff's motion for summary judgment, and that it did not meet its obligation under FRCP 11(b)(3). As such, the hearing set for the Plaintiff's motion is unnecessary. The Defendant has now admitted that the Plaintiff is entitled to an entry of judgment dismissing the Defendant's counterclaims and Third Party claims as a matter of law, and the hearing would therefore be superfluous.

Having made this startling admission, the Defendant lacks the decency to dismiss its claims on its own motion. Instead, (incredibly), the Defendant seeks the Court's permission to add further injury to the Plaintiff and the Third Party Defendants by forcing them to incur the significant legal expenses that accompany formal discovery, while the Defendant casts about for some unspecified evidence that will somehow support its claims. The Defendant has made no attempt whatsoever to articulate any basis that might lead the Court to believe that any such facts actually exist, or that of they existed that any such facts could be uncovered by discovery. The Defendant has failed to provide an example of even a single fact that the Defendant believes would support its claims. The Defendant has further

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failed to identify even a single witness, document, or other item that has even the potential to establish such a fact. Instead, the Defendant has asked the Court's permission to use the discovery process for an open-ended search for indeterminate evidence from unidentified individuals for unarticulated reasons. The Court should decline this request.

If the Court is unwilling to grant the Plaintiff judgment purely on the basis of the Defendant's admission that it cannot articulate sufficient evidentiary support to survive the Plaintiff's motion for summary judgment, the Court should nevertheless allow the matter to proceed as scheduled, as the pending hearing establishes undisputed facts sufficient to allow the Court to rule in the Plaintiff's favor. Also, the Plaintiff's motion further includes a motion to dismiss the Defendant's counterclaims and Third Party claims under FRCP 12(b)(6) for failing to state a claim upon which relief can be granted. Since no amount of discovery will rectify the deficiencies of the Defendant's pleading, the motion should proceed on that basis, if for no other reason.

CONCLUSION

The Plaintiff respectfully requests that the Court deny the Defendant's motion to reschedule or strike Plaintiff's motion for summary judgment.

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DATED this 20th day of October, 2005

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Certificate of Service

I hereby certify that on October 20, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Floyd Ivey, Peter J. Glantz, Sean Moynihan. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, Robert Prichett, Emily Abbey and Jamila Gordon.

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